UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: CYRUS II, LP BAHAR DEVELOPMENT, INC. MONDONA RAFIZADEH, et al., Debtors	§ § § § § § §	CASE NO. 05-39857 (Jointly Administered) Chapter 7
RODNEY D. TOW, AS THE CHAPTER 7 TRUSTEE FOR CYRUS II, L.P., et al Plaintiffs VS. SCHUMANN RAFIZADEH, et al Defendants	§ § § § § § § § § § §	ADV. NO. 07-03301

MOTION OF DEFENDANT VAFA MOTLAGH TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

Defendant VAGA MOTLAGH ("Defendant") files this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state claims for which relief can be granted. Defendant moves to dismiss the Complaints[1] (the "Complaints") filed by Rodney D. Tow, Chapter 7 Trustee (the "Trustee"), and Orix Capital Markets, LLC ("Orix"), as the Special Servicer of the Trust for the Certificateholders of the Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates,

[1] Doc. Nos. 1, 374, 520.

Series 1999-C (the "Trust"), (collectively, "Plaintiffs"). In support of the Motion to Dismiss, Defendant respectfully states as follows:

I. SUMMARY OF ARGUMENT

1. Defendant moves to dismiss the Complaints filed by the Plaintiffs pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

2. Orix does not have standing to assert any of the causes of action asserted in the Complaints because the claims belong exclusively to and may be asserted only by the Trustee.

3. The Trustee does not have standing to assert claims for conspiracy to commit fraudulent transfers.

4. The Complaints fail to state claims for which relief can be granted against Motlagh for (a) civil conspiracy, (b) alter ego, (c) single business enterprise, (d) constructive trust, (e) fraudulent transfer (URF/SFE Cash and Securities Transfers) and (f) fraudulent transfer (URF/Motlagh Cash and Securities Transfers).

II. DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

Fed R. Civ. P. 12(b)(1)

A. Orix lacks standing to assert *any* of the claims alleged in the Complaints.

5. On August 27, 2007, Defendants Schumann Rafizadeh, et al filed their Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (Doc. No. 121) which, *inter alia*, sought dismissal of

Counts 1-5 of the Complaint based upon the Trustee's exclusive right to bring avoidance actions and the corresponding absence of such right held by Orix as a mere creditor who has never sought to claim any right of derivative standing.

6. After an initial hearing on the issue, the Court directed the parties to file briefs on the question of Orix's standing as a Plaintiff in this adversary proceeding. Defendants Schumann Rafizadeh, et al thereafter filed their Memorandum of Law in Support of Motion to Dismiss Orix Capital Markets, LLC for Lack of Standing (Doc. No. 625).

7. Motlagh hereby incorporates by reference and realleges the matters alleged in the Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (Doc. No. 121) ("Rafizadeh Motion") and the Memorandum of Law in Support of Motion to Dismiss Orix Capital Markets, LLC for Lack of Standing (Doc. No. 625) in support of this Motion to Dismiss Orix ***as to all claims*** for lack of subject matter jurisdiction.

8. The Rafizadeh Motion was limited to Counts 1-5 of the Original Complaint. However, an examination of the remaining Counts of the Original Complaint and the subsequent claims asserted in the Supplemental and Second Supplemental Complaints reveal that each shares the common characteristic of being avoidance claims asserted

under § 544 or claims allegedly constituting property of the estates under § 541. Accordingly, Orix has no standing to assert such claims.

9. In its Response to Defendants' Memorandum of Law in Support of Motion to Dismiss Orix Capital Markets, LLC for Lack of Standing (Doc. No. 663), Orix relied heavily on the Compromise Order (Doc. No. 320; Case No. 05-39857) approving its Third Amended Settlement Agreement with the Trustee and the fact that Defendants Flash Vos, Inc., Schumann Rafizadeh and URF had withdrawn their objections to entry of the Compromise Order.[2] However, Orix admitted in its Response that the Court "would not take away the right of Defendants to raise the standing question 'who were not in the loop at the time of the compromise' during the hearing on the Motion to Dismiss."[3] Motlagh was "not in the loop" at the time the Compromise Order was entered and is not precluded by estoppel, waiver or the collateral attack rule from objecting to Orix's standing.

10. Orix' admits in its Response that it has no independent standing to sue but rather is "co-prosecuting" or pursuing claims "along with the Trustee on behalf of the Estates."[4] Orix concedes that there is no support in Fifth Circuit caselaw for its arrogation to this novel status as a non-statutory "helper" to the Trustee, but pins all its hopes for

[2] Doc. No. 663, ¶ 1, n.1.
[3] Doc. No. 663, ¶ 10 (quoting statement by Court from transcript of May 9, 2008 hearing).
[4] Doc. No. 663, ¶ 23.

standing on the opinion of the Second Circuit in *Glinka v. Murad (In re Housecraft Indus., USA, Inc.)*, 310 F.3d 64 (2d Cir. 2002). As acidly observed by the Court in *In re Automotive Professionals, Inc.*, 2008 Bankr. LEXIS 1796 (N.D. Ill. 2008), to approve the kind of joint prosecution of claims held solely by the Trustee allowed in *Housecraft*

> is to confer a type of 'helper' or 'buddy' standing upon a party who is not asserting his own right under substantive law but seeks merely to assist the rightful plaintiff in pursuing his case. Granting such 'buddy' standing violates the important principle of prudential standing that each party possess the right to the relief sought under substantive law.

Id. at *9.

11. Fifth Circuit has taken a more narrow view of derivative standing than the Second Circuit. *Housecraft* is premised on *In re Commodore Int'l, Ltd.*, in which the Second Circuit affirmed an order allowing a creditors' committee to pursue the bankruptcy estate's claims after the committee obtained the consent of the debtor-in-possession and the court found that the suit was in the best interest of the estate and "necessary and beneficial" to the fair and efficient resolution of the bankruptcy proceedings. 262 F.3d 96, 100 (2nd Cir 2001). It is evident that the standards for derivative standing articulated in *Commodore Int'l.* are far less stringent than those required in the Fifth Circuit.

12. In contrast, the Fifth Circuit proscribes that the "conditions necessary for the right to [obtain derivative standing] include the following: (1) that the claim must be colorable; (2) that the intervention

must be brought on behalf of the estate; and (3) that the trustee or debtor-in-possession has unjustifiably refused to bring the suit or abused its discretion in not suing." *In re McConnell*, 122 B.R. 41, 44 (S.D. Tex 1989) (citing *Louisiana World*, 832 F.2d 1391 (5th Cir. 1987)). There is simply no support for the notion that derivative standing for creditor "buddies" could be obtained merely on the basis of a "best interest of creditors" test and without the required element of inaction or refusal to act by the trustee or debtor in possession.

13. Because only the Trustee, and not his "buddy" Orix, has standing to pursue any of the claims asserted in the Complaints, the Court lacks subject matter jurisdiction over such claims, as asserted by Orix, and they must be dismissed under Fed. R. Civ. P. 12(b)(1). *See Steel v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

B. The Trustee lacks standing to assert a claim for conspiracy to commit fraudulent transfer.

14. In paragraph 513, et seq, of the Supplemental Complaint, Motlagh is added as a Defendant in Count 8, which alleges he participated in a civil conspiracy "with the Rafizadehs to accomplish their scheme to defraud creditors of BDI and Mondana." The Trustee lacks standing to assert a civil conspiracy claim because (a) under Texas law only a creditor holding a lien or security interest on the transferred property at the time of the transfer has standing to sue for a conspiracy and (b) under the Bankruptcy Code, the Trustee is not granted standing

to pursue any remedies beyond those allowed against transferees in § 550.

15. It has been settled law in the Fifth Circuit since 1984 that a bankruptcy trustee has no standing to assert a claim for conspiracy to commit fraudulent transfers under the Texas Fraudulent Transfer Act. *Mack v. Newton*, 737 F.2d 1343, 1362 (5th Cir. 1984). The *Newton* Court held that under Texas law there is no cause of action for a "general" or unsecured creditor for conspiracy to commit a fraudulent transfer under Texas law, citing *Estate of Stonecipher v Estate of Butts*, 591 S.W.2d 806, 808 (Tex. 1979). It follows that since the Trustee is a representative of the "general" or unsecured creditors in filing avoidance actions, he cannot recover under a conspiracy to commit fraudulent transfer theory. *Newton*, 737 F.2d at 1356, 1362.

16. *Newton* further holds that there is no liability for committing a fraudulent transfer other than as may be imposed on parties who are actual transferees. “We are persuaded that the Texas statute [currently Tex. Bus. & Comm. Code § 24.009], like the Bankruptcy Act, does not provide for recovery other than recovery of the property transferred or its value from one who is, directly or indirectly, a transferee or recipient thereof....Nowhere does it purport to prohibit any transfers or to render the making or receiving of them illegal or wrongful." *Id.* at 1361. The current remedies section of the Bankruptcy Code, 11 U.S.C. § 550, likewise limits the potential parties from whom recovery may be had to

transferees. *See In re Brentwood Lexford Partners*, 292 B.R. 255, 275 (Bankr. N.D. Tex. 2003)(refusing to expand remedies for fraudulent transfer under civil conspiracy theory since this would impermissibly exceed the scope of remedies afforded by § 550).

17. Count 8 of the Complaint, as supplemented, is a "shotgun" allegation that all Defendants were conspirators in all of the alleged transfers. Because the Trustee has no standing to allege a conspiracy claim under applicable law, Count 8 must be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

III. DISMISSAL FOR FAILURE TO STATE CLAIMS ON WHICH RELIEF MAY BE GRANTED

Fed R. Civ. P. 12(b)(6)

A. Legal Standard for Motions to Dismiss

18. Motlagh challenges the sufficiency of the Complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. The court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S.Ct. 99 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). In reviewing a Rule 12(b)(6) motion, the court must accept all well-plead facts in the complaint as

true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

19. In ruling on such a motion, the court generally cannot look beyond the face of the pleadings. *Baker*, 75 F.3d at 196; *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000). However, documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to its claim. *Causey v. Sewell Cadillac-Chevrolet*, 394 F.3d 285, 288 (5th Cir. 2004); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000). The Court may also refer to matters of public record when deciding a 12(b)(6) motion. *Test Masters Edu. Services, Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005).

20. A plaintiff, however, must plead specific facts, not merely conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Conclusory allegations and unwarranted deductions of fact are not admitted as true by a motion to dismiss. *Id.* Furthermore, under Fed. R. Civ. P. 9(b), fraud must be alleged with particularity. Although what constitutes "particularity" will necessarily differ with the facts of each case, *id.* at 288, at a minimum, Rule 9(b) requires the "who, what, when, where and how to be laid out." *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003)(quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 179 (5th

Cir. 1997)). Although a fraudulent transfer claim is arguably distinguishable from a fraud claim, Rule 9(b) has been held to apply to the Texas Fraudulent Transfer Act. *Indiana Bell Tel. Co., Inc. v. Lovelady*, 2006 U.S. Dist. LEXIS 7996 *6-7 (W.D. Tex. 2006)(citing *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 608-9 (5th Cir. 1967), applying Florida law).

B. Count 8: "Conspiracy to commit fraudulent transfer" is a non-existent claim and therefore must be dismissed under Rule 12(b)(6).

21. Motlagh incorporates by reference and realleges the arguments and authorities set forth in paragraphs 14 through 17 in support of his contention that Plaintiffs' claim for conspiracy to commit fraudulent transfer fails to state a claim upon which relief can be granted.

22. Conspiracy to commit fraudulent transfer may only be alleged by a creditor having a lien on the transferred property at the time of the transfer. *Mack v. Newton*, 737 F.2d at 1362(citing *Estate of Stonecipher v Estate of Butts*, 591 S.W.2d 806, 808 (Tex. 1979)). Since neither the Trustee, suing as a hypothetical unsecured creditor under § 544(b), nor Orix, as an actual unsecured creditor, are creditors who held liens on any of the property alleged to have been fraudulently transferred, the Complaints fail to state conspiracy to commit fraudulent transfer claims against Motlagh or any other Defendant upon which relief can be granted.

23. A fraudulent transfer is not a wrongful or illegal act that imposes "liability" for "damages" upon any of the parties involved:

> Although we have found no Texas decision in point, we are persuaded that the Texas statute, like the Bankruptcy Act, does not provide for recovery other than recovery of the property transferred or its value from one who is, directly or indirectly, a transferee or recipient thereof. The Texas statute does not purport to do anything other than render the transfer 'void' with respect to designated persons. It operates against the title of an "innocent" transferee who has not paid value just as fully as against the title of a transferee who has participated in a fraud. It does not purport to vary its operation on the basis of participation in wrongdoing or the lack thereof. Nowhere does it purport to prohibit any transfers or to render the making or receiving of them illegal or wrongful. The statute contains no words such as 'damages' or 'liability' or 'actionable.'

Id. at 1361-62. The enactment of the Bankruptcy Code, as amended, has not changed the result reached in *Mack v. Newton*. Section 550 is the exclusive remedies section for avoided transfers and no remedy against conspirators is provided. *In re Brentwood Lexford Partners*, 292 B.R. at 275.

24. Moreover, the term "fraudulent" when used in fraudulent transfer laws is not the same as "actual fraud":

> [A]n action for fraudulent conveyance is distinct from an action for fraud. *Nobles v. Marcus,* 533 S.W.2d 923, 925 (Tex.1976) ... Moreover, recovery cannot be based on common-law fraud because there is no evidence or finding of detrimental reliance by creditors or the damage occasioned thereby.

Id. at 1362 n.25. This distinction is critical, because the elements of a civil conspiracy require the allegation of an underlying tort or unlawful act.

25. Conspiracy is not an independent tort and proof of a conspiracy by itself does not create liability. *Tilton v. Marshall* 925 S.W.2d 672, 681 (Tex. 1996). Conspiracy is simply a way to impose liability in tort beyond the primary actor to those who agreed to act toward the common goal. *Carroll v. Timmers Chevrolet, Inc.*, 592, S.W.2d 922, 925 (Tex. 1979). Liability for conspiracy derives from the act done to further the conspiracy, not the conspiracy itself. *(Id.* at 925). The elements of a civil conspiracy claim are:

(1) The defendant was a member of a combination of two or more persons;

(2) The object of the combination was to accomplish:

(a) an unlawful purpose, or
(b) a lawful purpose by unlawful means;

(3) The members had a meeting of the minds on the object or course of action;

(4) One of the members committed an unlawful overt act to further the object or course of action; and

(5) The Plaintiff suffered injury as a result of the wrongful act.

Chon Tri v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005). As a matter of law, a fraudulent transfer is neither an "unlawful purpose", nor an "unlawful means", nor an "unlawful overt act" nor a "wrongful act." *Mack v.*

Newton, 737 F.2d at 1362. Plaintiffs have not alleged "actual fraud" by Motlagh or detrimental reliance by any creditors on any representation or omission to state material facts by Motlagh. It follows that there can be no actionable claim for conspiracy to commit fraudulent transfer against Motlagh or any other Defendant and therefore, as to such claim, Count 8 of the Complaints must be dismissed under Fed. R. Civ. P. 12(b)(6).

C. Count 8: The conspiracy to commit breaches of fiduciary duty claims fail because (a) the underlying wrongful acts are alleged post-petition fraudulent or subsequent transfers and (b) no fiduciary duty existed at the time any of the alleged acts of Motlagh occurred, all of which were post-petition.

26. In Texas, corporate officers and directors owe a strict fiduciary obligation to their corporation. *See Int'l Bankers Life Ins. Co. v. Holloway, 368* S.W.2d 567, 576-77 (Tex. 1963); *Lifshutz v. Lifshutz,* 199 S.W.3d 9, 18-19 (Tex. App.--San Antonio, 2006). While not uniformly defined by the case law, those fiduciary duties include not usurping corporate opportunities for personal gain, satisfying "the extreme measure of candor, unselfishness, and good faith," and dedication of his uncorrupted business judgment for the sole benefit of the corporation. *Holloway,* 368 S.W.2d at 577. More generally, the fiduciary status of corporate officers and directors give rise to three broad duties: the duty of due care, loyalty, and obedience. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719.

27. The elements of a civil conspiracy, described in C*arroll v. Timmers Chevrolet, Inc.*, 592, S.W.2d at 925, are set forth in detail in

paragraph 25 and are incorporated herein by reference. An examination of Count 6 of the Original Complaint, as well as the Supplemental Complaints, reveals that there is no allegation of the commission of any acts by Motlagh establishing any of the elements of a civil conspiracy to breach any fiduciary duty of Schumann Rafizadeh to BDI.

28. All of the actions of Schumann Rafizadeh alleged to have been breaches of his fiduciary duties to BDI occurred years prior to the earliest acts of Motlagh which appear to form the basis of Plaintiffs' claims against him. The Debtors' petitions were filed on June 27, 2005. All of the acts of Motlagh respecting the formation and activities of Universal Sourcing, LLC and Wellspring Sourcing occurred post-petition in 2006 or later. All of the transfers of cash and securities by SFE and URF to Motlagh occurred post-petition in 2006.

29. Once the petitions were filed, Schumann Rafizadeh was removed as an officer or director of BDI as a matter of law and his fiduciary duties arising from officer or director status came to an end. The Trustee thereafter assumed management and control of BDI. As a matter of law, therefore, Motlagh cannot have participated in a conspiracy to breach fiduciary duties owed by Schumann Rafizadeh to BDI at any time after June 27, 2005 because Schumann Rafizadeh had no fiduciary duties as an officer or director on or after that date.

30. The Complaints are devoid of any allegation of fact demonstrating any of the elements of a conspiracy as to Motlagh at any time Schumann Rafizadeh had any fiduciary duty to BDI. Moreover, the basis for the fiduciary duty claims are grounded in the assertion that Schyumann Rafizadeh's role in "devising, directing and implementing…fraudulent transfers," all of which predated any alleged involvement of Motlagh. Finally, since there is no claim for civil conspiracy to commit a fraudulent transfer and the making of a fraudulent transfer is neither a tort nor a wrongful act (see paragraphs 21-25 above), it follows that conspiring with an officer or director to cause a corporation to make a fraudulent transfer is not actionable. Accordingly, the remaining claims in Count 8 for conspiracy to breach fiduciary duties must be dismissed as to Motlagh under Fed. R. Civ. P. 12(b)(6).

D. Counts 13 and 14: Colorable Single Business Enterprise and Alter Ego claims are not alleged in the Complaints.

31. Motlagh incorporates by reference and realleges herein as grounds for dismissal under Rule 12(b)(6) the factual allegations, arguments and authorities alleged in the Motion for Partial Summary Judgment filed by Schumann Rafizdeh (Doc. No. 730) seeking partial summary judgment on Plaintiffs' alter ego claims and reconsideration of the Court's denial of summary judgment on Plaintiffs' single business enterprise claim.

32. Plaintiffs may not recover any contractual liability under an alter ego theory absent a showing of actual fraud. Under Tex. Bus. Corp. Act art 2.21 (Vernon Supp. 1999), the requirements for stating an alter ego claim were made substantially more stringent:

> A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate thereof or of the corporation, shall be under no obligation to the corporation or to its obligees with respect to: . .(2) any contractual obligation of the corporation *or any matter relating to or arising from the obligation* on the basis that the holder, owner, subscriber, or affiliate is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, or other similar theory, ***unless the obligee demonstrates that the holder, owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate;***

The Court should note that since Art 2.21 applies to owners as well as affiliates, it can be utilized for both "vertical" and "horizontal" veil piercing.

33. In *Rimade, Ltd. v. Hubbard Enterprises, Inc.,* 388 F.3d 138 (5th Cir. 2004), the Fifth Circuit defined the type of fraud which must be shown to pierce the corporate veil under Texas law:

> We must first determine whether Hubbard, using HEI as a sham, perpetrated an actual fraud on the Plaintiffs when he failed to disclose to them that their bank had canceled the Letter. ***Texas law defines fraud as the 'misrepresentation of a material fact with intention to induce action or inaction, reliance on the misrepresentation by a person who, as a result of such reliance, suffers injury.*** *Trustees of the N.W. Laundry & Dry Cleaners Health & Welfare Trust Fund v. Burzynski*, 27

> F.3d 153, 157 (5th Cir. 1994) (internal quotation marks and citation omitted).

Id. at 143 . The underlined portion of the quote plainly requires that the type of fraud which much be established under Texas law to pierce the corporate veil is representational or actual fraud.

34. Thus, under the current version of Article 2.21, the Plaintiffs must show Motlagh caused BDI to be used for the purpose of perpetuating and did perpetuate an actual fraud by making material misrepresentations primarily for Motlagh's direct personal benefit. Mere constructive fraud is insufficient to render Motlagh liable. *See Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74 (Tex. 2003) (reversing decision of appellate court that constructive fraud was sufficient for a finding of single business enterprise under Art. 2.21).

35. Moreover, none of the acts of Motlagh alleged in the Complaints, including the formation of Universal and Wellspring and the receipt of cash and securities from SFE or URF, occurred until after the petition date. Thus, none of the acts occurred at a time when the Rafizadehs were in control of BDI or had any fiduciary duties to BDI.

36. Alter ego and single business enterprise claims should not be applicable to those entities created after the debts in question were incurred or the persons asserted to be their alleged alter egos. In *Fluorine on Call Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 863 (5th Cir. Tex. 2004), the Fifth Circuit Court of Appeals specifically held that a parent corporation cannot be derivatively liable under an alter ego or single

business enterprise theory for a debt of a subsidiary when the debt was incurred prior to the parent's acquisition of the subsidiary. With respect to these theories, the Fifth Circuit stated a requirement of unified action:

> Both theories, therefore, presume that the corporations are unified at the time of the wrongful act. It is illogical, for example, to hold a parent liable for controlling another corporation's debts when it had no control at the time the debts were incurred (footnote omitted).

Id. at 861-862. The same is true here. It is illogical for entities such as Wellspring and Universal, created after the debt was incurred, or Motlagh as their alleged alter egos, to be considered as alter egos or as part of a single business enterprise. *See also Southern Union Co., supra* at 85 (Southern Union could not be part of a single business enterprise prior to the date it acquired subsidiary companies which incurred the debt in question).

37. The Plaintiffs have not pled any representation (or even an omission to state material facts) as required by the Texas definition of "actual fraud" in connection with the claims they seek to recover. Equally absent are any allegations that Plaintiffs relied to their detriment on any act or omission of Motlagh respecting BDI or any other Defendant or member of the Rafizadeh family. Nowhere in Plaintiffs' Complaints is an allegation of concealment or false misrepresentations made by statements or conduct of Motlagh or any of the other Defendants. The Complaints also fail to specify any injury based upon Orix's reliance in acting upon a statement or conduct by a Defendant.

38. Based upon the foregoing, Motlagh has shown that Plaintiffs have not met the legal prerequisites to pierce the corporate veil of the companies, individuals and partnerships[5] they seek to collapse under an alter ego theory because of the lack of allegations of actual fraud and the temporal disconnect between the times when Motlagh is alleged to have formed companies and received transfers and the times when debts are alleged to have been incurred by the Debtors.

39. Another basis for rejecting Plaintiffs' alter ego and single business enterprise claims is that they are being used impermissibly to expand the remedies available for recovering avoided transfers under Bankruptcy Code § 550 and the remedies provisions of the relevant state fraudulent transfer acts alleged by Plaintiffs. There is no reason why alter ego and single business enterprise theories should survive the same analysis of the courts in *Mack v. Newton* and *In re Brentwood Lexford Partners* respecting conspiracy claims (see paragraph 23 above). To allow recovery from alter egos and members of single business enterprises would improperly expand the remedies available under the Code. *In re Brentwood Lexford Partners*, 292 B.R. at 275. Accordingly, these claims must be dismissed under Rule 12(b)(6).

[5] There is no cognizable alter ego claim respecting partnerships. **Error! Main Document Only.**See e.g., *Pinebrook Prop., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487, 499-500 (Tex. App. – Texarkana 2002, pet. denied) (holding that alter ego theories are inapplicable to partnerships).

E. Count 16: Constructive trust is not an available remedy against Motlagh under the facts alleged in the Complaints.

40. Plaintiffs' constructive trust claim is yet another attempt to render unrecognizable a claim or remedy by stretching it beyond its proper bounds. The Fifth Circuit summarized the elements of a constructive trust claim under Texas law as follows:

> Under Texas law, a constructive trust is not actually a trust, but rather an equitable remedy imposed by law to prevent unjust enrichment resulting from an unconscionable act. *Ellisor v. Ellisor,* 630 S.W.2d 746, 748 (Tex. App. -- Houston [1st Dist.] 1982, no writ); *Lowther v. Lowther,* 578 S.W.2d 560, 562 (Tex. Civ. App. -- Waco 1979, writ ref'd n.r.e.); see also *Monnig's Dep't Stores, Inc. v. Azad Oriental Rugs, Inc. (In re Monnig's Dep't Stores, Inc.),* 929 F.2d 197, 201 (5th Cir. 1991) (applying Texas law). The two circumstances that generally justify the imposition of a constructive trust are actual fraud and the breach of a confidential or fiduciary relationship. *Meadows v. Bierschwale,* 516 S.W.2d 125, 128 (Tex. 1974); *Thigpen v. Locke,* 363 S.W.2d 247, 250-53 (Tex. 1962); *Grace v. Zimmerman,* 853 S.W.2d 92, 97 (Tex. App. -- Houston [14th Dist.] 1993, no writ); *Mims v. Beall,* 810 S.W.2d 876, 881 (Tex. App. -- Texarkana 1991, no writ); see also In re Monnig's Department Stores, 929 F.2d at 201 (applying Texas law). We have summarized the elements of a constructive trust under Texas law as (1) breach of a fiduciary relationship or, in the alternative, actual fraud, (2) unjust enrichment of the wrongdoer, and (3) tracing of the property to an identifiable res. *In re Monnig's Department Stores*, 929 F.2d at 201; see also *Rosenberg v. Collins,* 624 F.2d 659, 663 (5th Cir. 1980) (holding that, under Texas law, a constructive trust can attach only 'to some identifiable property which can be traced back to the original property acquired by fraud').

In re Haber Oil Co.,Inc., 12 F.3d 426, 436-37 (5th Cir. 1994). The kind of fraud required is actual fraud. *Id.* at 437. As previously shown, Plaintiffs have neither alleged actual fraud as to Motlagh nor any cognizable fiduciary duty he owed to Plaintiffs or any prepetition creditor.

41. A constructive trust claimant must be able to trace a specific asset or *res* to the defendant in question that resulted from the defendant's fraud or breach of fiduciary duty. *Meadows v. Bierschwale,* 516 S.W.2d 125, 128 (Tex. 1974). Plaintiffs do not allege any fund or *res* held by Motolagh; instead they claim he transferred the funds and securities allegedly received from URF and SFE to Universal or Wellspring. As such, the constructive trust claim fails, and must be dismissed under Rule 12(b)(6), because there is no underlying fraud or breach of fiduciary duty alleged to have been perpetrated by Motlagh and there is no identifiable fund or *res* alleged to be held by Motlagh to which the trust can attach.

F. Counts 17 and 18: Plaintiffs' Post-petition "fraudulent transfer" counts fail to state claims as a matter of law.

42. Plaintiffs assert standing to avoid certain transfers by SFE and URF to Motlagh on the basis that the estates are "creditors" of URF. The transfers in question occurred *after* the petition date, in January 2006. Thus, it appears that rather than trace the cash and securities in question back to one or more of the Debtors and then assert subsequent transferee liability against Motlagh (probably an impossible task of tracing), Plaintiffs seek to leapfrog the tracing of serial transfers by alleging creditor status *vis a vis* URF, thereby making *it* the initial

transferor, rather than merely another subsequent transferee from BDI or the other Debtors.

43. Plaintiffs allege no facts on which to base their claim as creditors of URF other than such claims as are asserted against URF in the Complaints. If this theory were to be upheld, any creditor asserting claims against subsequent transferees could contend that they thereby become "creditors" of each such transferee, such that they have standing to claim each subsequent transferee is an "initial transferee" of the prior transferor.

44. To the extent they are attempting to do so Plaintiffs cannot invoke state law fraudulent transfer remedies under Bankruptcy Code § 544 to avoid post-petition transfers since § 549 is the exclusive Code provision by which post-petition transfers may be avoided. § 544. Section 549 is the exclusive method to avoid post-petition transfers. *In re 31-33 Corp.,* 100 B.R. 744 747 (Bankr. E.D. Pa. 1989). Such claims are covered by the two-year limitation period in 11 U.S.C. § 549(d).

45. The powers of the trustee to avoid post-petition transfers under section 549 are broad and admit of only the narrowest exceptions. *Id.* (citing 4 COLLIER, supra, ¶ 549.02, at 549-6 to 549-8). In *In re 31-33 Corp.*, the Bankruptcy Court for the Eastern District of Pennsylvania heard a case where a realtor was paid $13,890.00 in connection with a transaction in which the Debtor sold all of its assets post-petition. *In re*

31-33 Corp., 100 B.R. at 745. The Trustee based its motion upon the fact that, although the court approved the sale of the Debtor's assets on December 11, 1986, neither counsel nor the realtor who received commissions were appointed as professionals by the court pursuant to 11 U.S.C. § 327(a). *Id.* at 746. On the other hand, the realtor asserted that the Trustee's cause of action was barred by 11 U.S.C.§ 549(d), which provides that "[a]n action or proceeding under this section may not be commenced after the earlier of . . . (1) two years after the date of the transfer sought to be avoided; or (2) the time the case is closed or dismissed." *Id.* (quoting 11 U.S.C § 549(d)). The court held that "§ 549 appears to be the sole provision addressing avoiding powers of the trustee to avoid or set aside post-petition transfers" and reasoned that

> [s]everal policies support the conclusion that § 549 is the exclusive means by which a trustee may attack post-petition transfers. First, it is only fair that the very broad power of the trustee under § 549 must be subject to certain definite limitations. Time is perhaps the only limitation which appears in § 549. In § 549(d) . . . appears a strict two-year statute of limitations. . . . Secondly, adopting the Trustee's version of the interplay between § 542 and § 549 would virtually obliterate the limitation period imposed by § 549(d). According to the Trustee, whenever he finds that an action under § 549 is barred by § 549(d), he alternatively could resort to § 542, which has no applicable statute of limitations.

Id. at 747-48.

46. Likewise, under basic rules of statutory construction, if the court in this case were to find that section 549(d) is trumped by section 541, the Trustee could resort to section 541, which has no applicable

statute of limitations, to avoid every conceivable post-petition transfer. Accordingly, such a reading of section 541 as trumping section 549(d) would render section 549(d), and its purpose and effects, superfluous. *See Id; c.f.*, *Rathbone v. Lake* (*In re Consol. Partners Inv. Co.*), 156 B.R. 982, 985 (Bankr. N.D. Ohio 1993) ("Thusly, [section] 549 provides an exception to [section] 362(a) since [section] 549 would be rendered useless if post[-]petition transfers were treated as being absolutely void. (citing *In re Brooks*, 79 B.R. 479, 480 (9th Cir. BAP 1987), aff'd., 871 F.2d 89 (9th Cir.1989))).

47. Moreover, the legislative history of section 549 supports its application to the case at bar. In *City of Farmers Branch v. Pointer* (*In re Pointer*), 952 F.2d 82 (5th Cir. 1992), the court discussed the legislative history of Section 549:

> The legislative history of § 549 is instructive. '[Section 549] modifies section 70(d) of current law. It permits the trustee to avoid transfers of property that occur after the commencement of the case. The transaction must either have been unauthorized, or authorized under a section that protects only the transferor.' H. Rep. No. 595, 95th Cong., 1st Sess. 375 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 90 (1978) U.S. Code Cong. & Admin. News 1978, 5787, 5876, 6331. As one treatise notes, '[t]he apparent intent of [§ 70(d) of the Bankruptcy Act of 1938] was to invalidate all transfers not granted specific protection under the statute, and thus set definite limits beyond which the courts could not go in protecting post-petition transactions.' 4 Collier on Bankruptcy ¶ 549.03[1] (1991).

Id. at n.6.

48. Plaintiffs have not alleged entitlement to avoid any transfers and have not even attempted to state a claim under 11 U.S.C. § 549. To the extent Plaintiffs purport to act under the auspices of § 544, their claims must be dismissed pursuant to Fed. R. Civl. P. 12(b)(6) because that Code section only applies to transfers occurring prior to the petition date.

WHEREFORE, PREMISES CONSIDERE, Defendant Vafa Motlagh respectfully prays that the Complaints be dismissed under Fed. R. Civ. P. 12(b)(1) and (6).

Respectfully submitted,

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ATTORNEY FOR VAFA MOTLAGH

CERTIFICATE OF SERVICE

I hereby certify that the foregoing instrument was filed electronically on July 30, 2008 in compliance with Local Rule LR5.3. As such, this response was served on all counsel of record who are deemed to have consented to electronic service. Pursuant to Fed.R.Civ.P. 5(d) and Local Rule LR5.3, all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing instrument by U.S. First Class Mail and/or facsimile on the 30th day of July, 2008.

/s/ *Barnet B. Skelton, Jr.*
BARNET B. SKELTON, JR.

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